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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No. ———

JAMES A. MURRAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether sovereign immunity precludes judicial review by the federal courts of Internal Revenue Service determinations which invalidate, for the purposes of 26 U.S.C. §6337(b)(1), liens established under state law.

2. Whether the Internal Revenue Service must conform to the requirements of the Due Process Clause of the United States Constitution in denying one's status as a redemptioner under 26 U.S.C. §6337(b)(1).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James A. Murray, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 26, 1982.

OPINIONS BELOW

The opinion of the United States District Court for the District of North Dakota is printed in Appendix B, hereto and is reported at 520 F.Supp. 1207 (D.N.D. 1981). The opinion of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the District

Court, is printed in Appendix A, page A-1, hereto and is not yet reported

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 26. 1982. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether sovereign immunity precludes judicial review by the federal courts of Internal Revenue Service determinations which invalidate, for the purposes of 26 U.S.C. §6337(b)(1), liens established under state law.

2. Whether the Internal Revenue Service must conform to the requirements of the Due Process Clause of the United States Constitution in denying one's status as a redemptioner under 26 U.S.C. §6337(b)(1).

STATUTES INVOLVED

This case involves the United States Constitution, Amendment V; 26 U.S.C. §§6337-6339; 28 U.S.C. §§1346, 1361, 2674, 2680, and N.D. Cent. Code §32-17-01. Because these provisions are lengthy, their pertinent text is set forth in Appendix G, pages G-1 to G-10.

STATEMENT OF THE CASE

A Factual Statement

On December 20, 1978, Fireside, Inc., mortgaged the real estate in question to Petitioner, James A. Murray (Murray), and some of Murray's family members. Mur-

ray filed the mortgage with the Cass County Register of Deeds on the same date. In addition to Murray's mortgage, the real estate was encumbered by prior judgment liens, federal tax liens and a mortgage to the Casselton State Bank, Casselton, North Dakota. Subsequent to December 20, 1978, the Internal Revenue Service (IRS) filed additional tax liens.

On April 18, 1979, the property was seized for nonpayment of taxes. The property was sold to the Respondent. United States (U.S.), for the highest bid at the tax auction. In view of Murray's interest in the property, and long before the redemption period expired, Murray on August 13, 1979, pursuant to the requirements of 26 U.S.C. §6337(b) (1), tendered a check to the IRS in the amount of $320.00 which was the amount necessary for the redemption of the real estate. (See Appendix C, page C-1.) The IRS rejected the tendered redemption funds on the basis that Murray's mortgage was invalid, which, it asserted, disqualified Murray as a §6337 redemptioner. (See Appendix D, page D-1.) Again on September 9, 1979, Murray tendered the necessary funds and pointed out that the IRS had no standing to object to the mortgage, and that he did have the status of a redemptioner. (See Appendix E, page E-1.) Despite Murray's consistent assertion of his right to redeem, the IRS repeated its refusal of the tendered funds. (See Appendix F, page F-1.)

The redemption period expired on October 6, 1979, with Murray unable to get the IRS to recognize his redemption rights. The U.S. received a deed to the Fireside, Inc., property on November 30, 1979. On December 27, 1979, Murray filed his claim for damages with the IRS. Prior to the denial of his claim, the U.S. sold its interest

in the property to the Casselton State Bank. Following this sale, the IRS on April 1, 1980, denied Murray's claim for damages. The denial prompted the commencement of the present action for the recovery of damages suffered by Murray as a result of the IRS's wrongful denial of Murray's right to redeem or, in the alternative, a setting aside of the U.S.'s transfer of the real estate and compelling it to recognize Murray's redemption of the Fireside, Inc., property.

B. Procedural Statement

On December 27, 1979, Murray submitted his administrative claim for damages with the IRS in Fargo, North Dakota. Murray's claim for $70,000.00 was based on the valuation of the security he held on the Fireside, Inc., property which was lost when the IRS refused to recognize his right of redemption. Murray's claim was denied. An action was commenced in the Federal District Court for the District of North Dakota on September 30, 1980. Jurisdiction was based upon 28 U.S.C. §§1340, 1346, 1361, 1402, and 2410. The District Court, without deciding whether Murray's mortgage was valid or invalid, dismissed the action stating that it lacked jurisdiction to hear the matter as no waiver of sovereign immunity applied to Murray's claims. More specifically, it noted that Murray's claim for damages under §1346 could not be heard as it was a "claim arising in respect of the assessment or collection of any tax. . .". *Murray v. United States*, 520 F.Supp. 1207, 1210 (D.N.D. 1981) *citing* 28 U.S.C. §2680(c). Also, it concluded that mandamus relief under §1361 provided no waiver of immunity. *Id. at* 1209.

On appeal, the Court of Appeals affirmed the District Court pointing out that waivers of sovereign immunity must be explicit, and that §2680(c) barred Murray's claims for civil damages or mandamus. The Court of Appeals also decided that Murray's due process claim, for the IRS's failure to afford him a hearing on the denial of his redemption rights, did not remove the barrier of sovereign immunity. Consequently, the District Court and the Court of Appeals concluded that Murray was barred from any remedy against the U.S., as the purchaser of the Fireside, Inc., property, for its refusal to accept his redemption of the property.

REASONS FOR GRANTING WRIT

This case presents a situation which has not been directly addressed by this Court. It raises serious federal questions as to the avenues available to an individual to enforce his rights as a redemptioner under federal law. Through an overbroad construction of an exception to Congress' waiver of sovereign immunity under the Federal Torts Claims Act, the Court of Appeals has prevented individuals, such as Murray, from seeking an enforcement of their rights as redemptioners under federal law and to preserve their interest in property that has been seized for non-payment of taxes. The Court of Appeals has foreclosed such individuals from both legal and equitable remedies where the U.S. is the entity which refused to honor one's redemption rights. This conclusion is contrary to decisions of the United States Court of Appeals for the Tenth Circuit and other lower courts that recognize that redemption rights can be enforced in the federal courts. Finally, the Court of Appeals' decision is contrary to

this Court's prior decisions which hold that an implied cause of action exists in the Fifth Amendment to the United States Constitution to enforce one's due process rights.

It is clear that §6337(b) (1) gives the status of redemptioner to "any person having any interest" in property which has been seized and sold for non-payment of taxes. As a mortgagee of the Fireside, Inc., Murray certainly fell within this definition and acquired the status of a redemptioner once the Fireside, Inc., property was sold and purchased by the U.S.[1] In its own prior decisions, the Court of Appeals recognized that one's right to redeem is a property right. *Buss v. Prudential Ins. Co. of America*, 126 F.2d 960, 968 (8th Cir. 1942). *See also. McLean v. Federal Land Bank of Omaha*, 130 F.2d 123 (8th Cir. 1942). The loss of such a right must afford a remedy to the injured party or, at a minimum, not be taken without affording the affected party a hearing on the matter. As the following discussion will show, the Court of Appeals' decision left Murray with no remedy for; or an opportunity to be heard about, the loss of his property rights. The denial of both a remedy and an opportunity to be heard is sufficient reason for the granting of this writ.

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[1]The District Court specifically noted that it would not decide whether Murray's mortgage was valid. Thus, the Disrict Court's opinion would be applicable regardless of the validity or invalidity of the lien in question. *Murray v. United States*, 520 F.Supp. 1207, 1208 (D.N.D. 1981), n. 1.

I.

The Court of Appeals' Broad Construction of 26 U.S.C. §2680(c) Precluded Murray as a Non-Taxpayer Interested Person from Seeking any Judicial Review or Remedy for the Internal Revenue Service's Invalidation of His Interest in Property Seized for Non-Payment of Taxes.

This action stems from the IRS's unilateral decision that ruled Murray's mortgage to be invalid, and that he would not qualify as a person with an interest in the Fireside, Inc., property so as to be considered a redemptioner under §6337(b) (1).[2] The IRS's determination was made on an in-house basis without any hearing, presentation of evidence or input by Murray. Murray's action under the Federal Torts Claim Act would have brought this determination before a court where such a "judicial" determination should have been made. Such action was necessary as the failure to redeem would result in a deed being issued to the U.S., as the purchaser, under 26 U.S.C. §6338, which would have the effect of voiding Murray's interest in the Fireside, Inc., property.[3] Therefore, in order

[2]The language of 26 U.S.C. §6337(b)(1) permits "any person having an interest therein, or a lien" on the property seized to redeem the same. Murray's mortgage at a minimum qualified as an interest in the property. Nowhere does the language of the statute give any governmental agency the power, let alone non-reviewable power, to determine the validity of the asserted interest or lien.

[3]Under 26 U.S.C. §6339(c), a deed issued pursuant to 26 U.S.C. §6338 discharges the "property from all liens, encumbrances, and titles over which the lien of the United States with respect to which the levy was made had priority." The Court of Appeals relied upon the decision of *Capital Savings Association v. Runnels*, 361 So.2d 458 (La. App. 1978), in support of its decision. The *Runnels* decision clearly shows and reiterates the effect a §6339 deed has on interests in property sold for taxes. As pointed out by the *Runnels* court, the discharging effect of a §6339 deed applied equally to federal and state court proceedings concerning subsequent claims against the property. Thus, to prevent this total voiding of his interest, Murray had to redeem.

to obtain some type of judicial review of the IRS decision, Murray had to seek to compel the U.S., as the purchaser, to honor his valid redemption, or if this could not be done due to the subsequent conveyance, to pay damages for the wrongful deprivation of his property rights.

Murray's action under the Federal Tort Claims Act, 28 U.S.C. §1346(b), and mandamus statute, 28 U.S.C. §1361, was appropriate under the circumstances. The tort claim was an alternative remedy which would compensate Murray for the loss of his property rights if the loss could not be undone through mandamus. The United States Court of Appeals for the Tenth Circuit has previously recognized that one, whose redemption of property sold at a federal tax sale is wrongfully rejected, may bring an action to enforce that right. *See Guthrie v. Curnutt*, 417 F.2d 764 (10th Cir. 1969). While *Guthrie* involved a private individual as purchaser, the express purpose of the 28 U.S.C. §2674 waiver of sovereign immunity was to treat the U.S. the same as private individuals under similar circumstances. Consequently, the Eighth Circuit Court of Appeals should have recognized an equal right in Murray to enforce his redemption rights where the U.S. rather than an individual was the purchaser. *See also, DiFoggio v. United States*, 484 F.Supp. 233 (N.D. Ill. 1979).

Rather than afford Murray a remedy, the Court of Appeals broadly construed the exception to the §2674 waiver of sovereign immunity embodied in 28 U.S.C. §2680(c). It was an unjustified expansion of §2680(c) for the Court of Appeals to conclude that Murray's claims to enforce his redemption rights constituted a claim arising from the "assessment or collection of any tax". Murray was not contesting the assessment or collection of the taxes owed

by the Fireside, Inc. Indeed, the taxes are paid upon the sale of the property.[4] Redemption rights are a matter between the purchaser at the sale and certain identified individuals who have an interest in the property. The redemption period is not part of the tax assessment and collection process. By ruling that it is, the Court of Appeals disregarded this Court's admonition that waivers of sovereign immunity are to be liberally construed, and exceptions to the waiver were not to be broadened by refinement or construction. *See United States v. Muniz*, 374 U.S. 150 (1963), and *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951).

The Court of Appeals' broad application of §2680(c) deprived Murray of the only two possible remedies available. That is, either the U.S. must be forced to recognize his redemption or, if the subsequent conveyance to the Casselton State Bank which disregarded the redemption could not be undone, the U.S. must compensate Murray for the loss. Under the Court of Appeals' decision, the IRS's determination as to the validity of a lien established under state law cannot be reviewed. As a result, the IRS has unbriddled discretion to avoid interests in real property seized for non-payment of taxes without ever affording the affected parties either an opportunity to be heard or a remedy for the loss. This Court should not permit sovereign immunity to be used as a shield by the IRS where its

[4]In circumstances where a private individual purchases at a tax sale the tax would be paid by tendering the purchase price. In the present case, the U.S., as the purchaser, traded the taxes owed for a certificate of sale which would enable it to obtain a deed to the property. In both situations, the purchaser's purchase is subject to the rights of others to redeem. The right of redemption, however, does not alter the fact that the taxes were paid upon the actual purchase of the property. Therefore, the tax assessment and collection process is complete on the sale of the property.

conduct unjustifiably deprives one of a valuable property right. There must be a remedy.[8]

II.

The Internal Revenue Service Was Required to Follow the Basic Principles of Due Process in Its Determination of the Validity of Murray's Mortgage, and Murray Was Entitled to Maintain An Action to Enforce Such Rights or Be Compensated for a Violation of These Rights.

The Fifth Amendment to the United States Constitution forbids the deprivation of property rights "without due process of law." As shown in the previous discussion, Murray lost a valuable property right solely because the U.S. refused to accept his redemption of the Fireside, Inc., property. The loss stemmed from the unilateral in-house decision of the IRS. At no time was Murray afforded an evidentiary hearing or the opportunity to present evidence supporting the validity of his mortgage. Nor was he informed of the evidence relied upon by the IRS or given an opportunity to rebut this evidence. It is a basic principle of the Fifth Amendment Due Process Clause that be-

[8]The Court of Appeals in its opinion indicates that Murray may have a remedy via a quiet title action under N.D. Cent. Code §32-17-01 (1976 Repl.). The text of this section is set out in Appendix G. Such a statement is contrary to the Appeal Court's reliance on *Runnels*. As indicated in note 3, *supra*, failure to redeem from a tax sale voids junior lienholder's interests upon the issuance of a §6339 deed. This effect applies to any subsequent claim made by would-be redemptioners in federal or state court proceedings. Consequently, Murray's inability to get the U.S. to recognize his redemption of the Fireside, Inc., property and the issuance of a §6339 deed to the U.S. caused Murray to lose any standing he may have had under §32-17-01. That is, he no longer has the requisite estate, interest, lien, or encumbrance upon the Fireside, Inc., property to have standing to commence an action under §32-17-01.

fore property interests can be taken, the affected party must have an opportunity to be heard at a meaningful time and manner. *See Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Goldberg v. Kelly*, 397 U.S. 254 (1970). The unilateral ex parte decision of the IRS failed to meet this standard.

Murray's action merely sought redress for the violation of his constitutional rights either by requiring the U.S. to recognize and accept his redemption or compensate him for the loss. As shown previously, he had no other remedy, and the federal courts certainly had jurisdiction to fashion a remedy for such a constitutional violation. This Court's decision in *Davis v. Passman*, 442 U.S. 228 (1979), reiterated the concept that it is the judiciary which has the power to enforce constitutional rights. Where an individual such as Murray has no other means to enforce his rights, a cause of action is implied under the Fifth Amendment giving the courts power to protect the constitutional rights of the individual. *Id.* at 242-243 In view of this implied cause of action set out in *Passman*, the Court of Appeals should not have relied upon §2680 (c) to uphold the unconstitutional conduct of the U.S. through its IRS agents.[8]

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[8] *International Telephone & Telegraph Corp. v. Alexander*, 396 F. Supp. 1150 (D. Del. 1975). In *ITT*, the plaintiff sought judicial review of the IRS's revocation of certain private letter rulings. The defendant challenged the court's subject matter jurisdiction on the basis of statutes which would bar such a suit. Recognizing that the letter rulings constituted a property interest, the *ITT* court pointed out that their revocation would have to be made in accordance with due process rights, and that before they could be revoked the affected party was entitled to be heard. *Id.* at 1166. The court concluded that statutes which could be construed as barring a review of the IRS's decision could not be relied upon to prevent such a suit where there was no other meaningful opportunity to be heard. That is, statutes barring a suit could not be interpreted to compel an unconstitutional result. *Id.* Similarly, the Court of Appeals should not have relied upon the sovereign immunity doctrine to bring about an unconstitutional result.

The Court of Appeals' decision foreclosed Murray from any remedy or opportunity to be heard on a decision which cost him a valuable interest in the Fireside, Inc., property. Neither the U.S., the Court of Appeals, or the District Court showed in what respect Murray had adequate alternative avenues of relief, or that Congress has provided a statutory remedy to replace Murray's right to enforce his due process rights with respect to his right to redeem the Fireside, Inc., property. Such a showing was necessary to bar Murray's implied cause of action under the Fifth Amendment Due Process Clause. *See Carlson v. Green*, 448 U.S. 14 (1980). Therefore, the Court of Appeals should have recognized the inherent power of the federal courts to fashion a remedy for constitutional rights violations and reversed the District Court's dismissal of Murray's action.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

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